

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 24, 2006

MICHAEL L. BROMLEY v. STATE OF TENNESSEE

Appeal from the Circuit Court for Lawrence County
No. 22300 Robert L. Jones, Judge

No. M2005-01822-CCA-R3-PC - Filed February 23, 2006

The petitioner pled guilty on December 11, 2000, to two counts of attempted second degree murder. He was sentenced to eight years on each conviction to be served consecutively in the community corrections program. On May 9, 2002, his community corrections sentence was revoked and the trial court ordered that the petitioner complete his original sentence in confinement with credit for time served. The petitioner never appealed either sentence. On July 8, 2005, the petitioner filed a petition for post-conviction relief. The post-conviction court summarily dismissed the petition for failure to state a claim and because it was time-barred. The petitioner appeals the post-conviction court's decision. We affirm the decision of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL, and ROBERT W. WEDEMEYER, JJ., joined.

Michael L. Bromley, Pro Se, Nashville, Tennessee.

Paul G. Summers, Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; and Mike Bottoms, District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner pled guilty to two counts of attempted second degree murder on December 11, 2000. He was given an eight-year sentence for each conviction to be served consecutively as a Range I Standard Offender. This sentence was to be served in community corrections. However, as part of the plea agreement, the petitioner agreed to be sentenced to a higher range if he violated his community corrections sentence. The petitioner did not appeal this sentence.

On May 9, 2002, the trial court fully revoked the petitioner's community corrections sentence. The trial court also ordered that the petitioner serve his original sentence as imposed with credit for time served. The revocation order made no mention of a new sentencing range for the petitioner.

On July 8, 2005, the petitioner filed a petition for post-conviction relief. The post-conviction court filed a preliminary order of dismissal on the same date. The post-conviction court did not hold a hearing and dismissed the petitioner's petition because it failed to state a colorable claim and was not timely-filed. The petitioner filed a notice of appeal.

ANALYSIS

The petitioner's sole argument is that the post-conviction court erred in dismissing his petition for post-conviction relief. The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issue raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the court's findings unless the evidence in the record preponderates against those findings. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997); Alley v. State, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. See State v. Honeycutt, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001).

The post-conviction court stated the following in its order:

(2) The petition shall be dismissed for failure to assert a colorable claim based on the following findings of fact: The petitioner, Michael L. Bromley, on December 11, 2000, pled guilty to two counts of attempt to commit second degree murder and was given two consecutive sentences of eight years for each count., [sic] in accordance with his plea agreement.

(3) The findings of fact require dismissal based on these conclusions: The case of Blakely v. Washington cited by the petitioner does not apply in cases where the sentences were imposed in accordance with an agreement by the defendant as to the specific terms of the sentence. Also, in State v. Gomez a majority of the Tennessee Supreme Court on January 4, 2005, concluded that Blakely v. Washington does not announce a new rule of constitutional law, but merely applies a previously recognized principal of law. Therefore, the Bromley petition for post-conviction relief was not timely filed.

Timely-Filed Petition

Since July 1, 1995, the statute of limitations for filing a petition for post-conviction relief has been one year from the date on which the judgment of conviction became final in cases where no appeal is taken. Tenn. Code Ann. § 40-30-202(a). There are three statutory exceptions to the statute of limitations in post-conviction matters. These exceptions are set forth in Tennessee Code Annotated section 40-30-202(b) (1), (2) & (3): (1) claims based on an appellate court ruling concerning a constitutional right not recognized at the time of the trial and given retroactive effect by the appellate courts; (2) claims based upon newly discovered evidence which establishes that the petitioner is actually innocent of the crime; and (3) claims which arise out of a situation where the petitioner received an enhanced sentence for a crime based on previous convictions which were later held to be invalid.

The petitioner relies upon the first exception, that an appellate court has recognized a constitutional right in a ruling since the trial and has applied that ruling retroactively. To support his argument, the petitioner relies upon the United States Supreme Court case of Blakely v. Washington, 542 U.S. 296 (2004).

The Tennessee Supreme Court recently determined that Blakely did not announce a new rule of law and that “the Tennessee Criminal Sentencing Reform Act does not authorize a sentencing procedure which violated the Sixth Amendment right to jury trial.” State v. Gomez, 163 S.W.3d 651-52, n.16 (Tenn. 2005). In Gomez, the court determined that despite the ability of trial judges to set sentences above the presumptive sentence based on the finding of enhancement factors neither found by a jury or admitted by a defendant, Tennessee’s sentencing structure does not violate the Sixth Amendment and does not conflict with the holdings of Blakely v. Washington, 542 U.S. 296 (2004), United States v. Booker, 543 U.S. 220 (2005), or United States v. FanFan, the case consolidated with Booker, because “[t]he Reform Act [of Tennessee] authorizes a discretionary, non-mandatory sentencing procedure and requires trial judges to consider the principles of sentencing and to engage in a qualitative analysis of enhancement and mitigating factors . . . all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature.” Gomez, 163 S.W.3d at 661. Therefore, for purposes of the exception to Tennessee Code Annotated section 40-30-102, a new constitutional rule has not been retroactively applied. For this reason, the petitioner’s argument must fail.

The final judgment in the petitioner’s case was filed on May 9, 2002. He did not file his petition until July 8, 2005, more than three years after the judgment became final. The petitioner’s petition was clearly not timely-filed and does not fall under one of the three exceptions as set out under Tennessee Code Annotated section 40-30-102. Therefore, the petitioner’s issue is without merit.

Colorable Claim

The fact that the petition was filed after the statute of limitations had run is sufficient to support the post-conviction court's dismissal of the petition. Nonetheless, we will still address whether the petitioner's presented a colorable claim. The petitioner argues that his due process rights were violated and that his sentences were illegal because of the enhancement factors used to increase his sentence.

The post-conviction court stated as a finding of fact in its order that there was no colorable claim because the petitioner agreed to two consecutive, eight-year sentences as part of his plea agreement. As stated above, there is a presumption of correctness with regard to a post-conviction court's finding of fact. We have found nothing in the record to preponderate against those findings. In addition, we point out that the petitioner was sentenced in 2000 as a Range I offender to a Class B felony, attempted murder. The range of sentence is eight to twelve years. The petitioner was sentenced to the minimum sentence in his range. Therefore, his sentence was not increased above the minimum by reliance upon any enhancement factors.

Therefore, this issue is without merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the post-conviction court.

JERRY L. SMITH, JUDGE